

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



FILED

02-01-07
04:59 PM

Order Instituting Rulemaking to Implement the
California Renewables Portfolio Standard
Program

Rulemaking 04-04-026
(Filed April 22, 2004)

**PETITION FOR MODIFICATION OF D.04-06-014 OF
PACIFIC GAS AND ELECTRIC COMPANY (U 39 E)
AND SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E)
REGARDING STANDARD TERMS AND CONDITIONS REQUIRED
FOR RENEWABLES PORTFOLIO STANDARD CONTRACTS**

I. INTRODUCTION

In 2004, the Commission adopted standard terms and conditions for Renewables Portfolio Standard (“RPS”) contracts, stating that these terms were intended to “develop a ‘year one’ contract to enable the RPS solicitation to move forward,” with the “expect[ation] that the contract language will become more refined as the parties and the Commission gain further experience.”¹ The process for updating standard terms and conditions to reflect that experience, which should take place through the review and approval of annual RPS plans, requires clarification.

The Assigned Commissioner and Administrative Law Judge, when establishing the framework for the first RPS contracts, also recognized that experience might support revisiting the determination that some terms and conditions should not be subject to negotiation.² The restriction on negotiations of those provisions has proven to hinder, not help, progress towards RPS goals, slowing negotiations and reducing the appeal of the California marketplace to RPS development.

¹ Decision (“D.”) 04-06-014 at 6 ((June 2004); see also Joint Ruling of Assigned Commissioner and Administrative Law Judge Regarding Procedure for Adoption of Standard Terms and Conditions at 2 (March 2004) (the “Joint Ruling”)(stating the same).

² Joint Ruling at 6.

For these reasons, Pacific Gas and Electric Company (“PG&E”) and Southern California Edison Company (“SCE”) (collectively, “Petitioners”) submit this Petition for Modification pursuant to Rule 16.4 of the Commission’s Rules of Practice and Procedure, seeking clarification of the process for evolution of the standard terms and conditions and elimination of the restriction on negotiations.

II. JUSTIFICATION FOR TIMING OF PETITION FOR MODIFICATION

Commission Rule 16.4(d) requires petitions for modification filed more than one year after the effective date of the decision at issue must be accompanied by a justification for the timing of the petition. At the time of the Joint Ruling and the issuance of D.04-06-014, the Commission expressly recognized the potential for revisiting the RPS standard terms and conditions as the program developed and experience was gained with those terms and conditions, as noted above.³

The issues for which Petitioners now seek clarification and modification have developed over time, through experience with the RPS contract negotiation and approval process as well as the continual evolution of the RPS program, RPS technology, and the commercial and legal environment in which RPS contracts are executed. As this petition is intended to address concerns that have arisen through the experience anticipated by the Commission, and as such experience could not have been reflected in a petition for modification filed within one year, the timing of this petition is justified.

³ Id.

III. BACKGROUND OF RPS STANDARD TERMS AND CONDITIONS

The initial RPS statute, S.B. 1078, required the Commission to adopt standard terms and conditions for RPS contracts.⁴ The development of these standard terms and conditions was the subject of extensive proceedings, which culminated in the Joint Ruling and D.04-06-014.⁵ As noted by the Joint Ruling, the term “standard” is subject to multiple interpretations, and “the statute provides minimal guidance” as to its intended meaning in this context.⁶

Consensus on the standard terms and conditions was not reached by the parties to the proceedings, but two primary groups coalesced:⁷ the “CEERT Parties”⁸ and the “CalWEA Parties.”⁹ Both of these groups, as well as individual parties that included SCE and Solargenix, supported an interpretation of the term “standard” that would allow all terms to be changed through negotiations by the contracting counterparties, although some advocated limitations to protect RPS developers against the bargaining weight of the utilities.¹⁰ These parties raised concern, as recognized by the Joint Ruling, that “immutable standard terms may frustrate commercial transactions by making it more difficult and costly for a supplier to bid its services, or by preventing a utility from accommodating the sellers’ needs.”¹¹

Ultimately, the Joint Ruling determined that the standard terms and conditions should fall into one of two categories: those for which “no negotiation w[ould] be allowed,” and those for

⁴ Pub. Util. Code § 399.14(a)(2)(D) (S.B. 107 subsequently amended this provision, but did not change any pertinent aspects).

⁵ See D.04-06-014 at 2.

⁶ Joint Ruling at 4-5.

⁷ D.04-06-014 at 4.

⁸ Comprised of the Center for Energy Efficiency and Renewable Technologies (“CEERT”), the Independent Energy Producers Association (“IEP”), PG&E, San Diego Gas & Electric Company (“SDG&E”) and The Utility Reform Network (“TURN”).

⁹ Comprised of the California Wind Energy Association (“CalWEA”), the California Biomass Energy Alliance (“CBEA”), and Vulcan Power Company.

¹⁰ Joint Ruling at 3-6.

¹¹ *Id.* at 3.

which negotiations would be permissible.¹² The Joint Ruling acknowledged that the “general concept” of the CEERT Parties and the CalWEA Parties “to simultaneously allow for negotiation but to control the negotiation process” had “merit” and could be the subject of further consideration, but declined to adopt that approach at that time.¹³

D.04-06-014 subsequently ratified the Joint Ruling’s approach to standard terms and conditions,¹⁴ and approved the proposal for specific terms and conditions of the CEERT Parties, with certain modifications.¹⁵ In response to the CEERT Parties’ comments on the draft decision, the Commission identified which of the standard terms “could be modified by the parties through negotiation,”¹⁶ by adding the phrase “may not be modified” to each clause not subject to negotiation.¹⁷ The Commission, in adopting these standard terms and conditions, stated that they were intended to “develop a ‘year one’ contract to enable the RPS solicitation to move forward,” with the “expect[ation] that the contract language will become more refined as the parties and the Commission gain further experience.”¹⁸

IV. TO SUPPORT RPS DEVELOPMENT, EVOLUTION OF RPS CONTRACTS AND COMMERCIALLY REASONABLE FLEXIBILITY IS NECESSARY

RPS contracting experience has demonstrated the need for clarification of the process for revision of standard terms and conditions, and for lifting the restriction on those terms and conditions currently designated as not subject to modification through negotiation. Each year,

¹² Id. at 6.

¹³ Id.

¹⁴ D.04-06-014 at 16.

¹⁵ Id. at 4-6.

¹⁶ D.04-06-014 at 16 (stating, in pertinent part: “The CEERT Parties, SCE, and the CalWEA Parties note that a Joint Ruling issued on March 8, 2004 (in R.01-01-024) identified which terms and conditions could be modified by the parties through negotiation, but the draft decision omits that identification. Consistent with the March 8 Joint Ruling, Appendix A now indicates the negotiability of each standardized term and condition.”)

¹⁷ See id., Appendix A.

¹⁸ Id. at 6; see also Joint Ruling at 2 (stating the same).

the Investor-Owned Utilities (“IOUs”) are required to submit plans for their intended procurement of RPS resources (“Annual RPS Plans”), which include both bid solicitations and *pro forma* power purchase agreements (“PPAs”).¹⁹ The annual update of these plans presents the appropriate and efficient opportunity to revise standard terms and conditions to reflect the experience of prior years. RPS contracting experience to date has already shown that a non-negotiable, cookie-cutter approach to even a selected group of standard terms and conditions does not serve RPS goals well, as rigid provisions cannot fit the increasingly diverse technology, project, and financing needs of otherwise-viable RPS projects.

Attainment of the RPS goals will require the efficient, focused and streamlined efforts of RPS-obligated entities, RPS developers, and the Commission. Together, we should identify ways in which we can achieve more with less, enabling statutorily-required processes to serve as many RPS regulatory needs as possible and reducing other processes to the maximum extent. Petitioners recommend that the Commission provide the following clarifications and modifications to D.04-06-014:

- (1) The Commission should clarify that RPS-obligated entities may propose changes in the standard terms and conditions as part of their Annual RPS Plans;
- (2) The Commission should lift all current restrictions on negotiation of designated standard terms and conditions; and
- (3) The Commission should clarify that all RPS contracts should be submitted by advice letter for approval through Commission resolution.

¹⁹ Pub. Utilities Code § 399.14; see Scoping Memo and Ruling of the Assigned Commissioner, R.06-05-027, at 4, Attachment C (August 21, 2006) (“2007 Annual RPS Plan Scoping Memo”).

A. Standard Terms & Conditions Should be Reviewed Through the Annual RPS Plan Process

As noted above, the IOUs provide Annual RPS Plans that include *pro forma* PPAs, which in turn incorporate the RPS standard terms and conditions. In accordance with the Scoping Memo and Ruling of the Assigned Commissioner setting forth requirements for the 2007 Annual RPS Plans, the solicitation package is required to incorporate “lessons learned” from RPS contracting experience.²⁰ The package is open to comment from stakeholders, and subjected to full review and approval by the Commission. The solicitation package is thus an efficient vehicle for the Commission to consider revisions of the standard terms and conditions in context, fully consistent with the Commission’s expressed expectation that “contract language will become more refined as the parties and the Commission gain further experience.”²¹ The current process of review of the 2007 Annual RPS Plans incorporated changes needed to implement S.B. 107 in standard terms and conditions as well as to other aspects of the solicitation, demonstrating that the review process can provide the appropriate means to update standard terms and conditions.

The Commission should clarify that as part of the continuing effort to improve the RPS process through “lessons learned,” the utilities may submit proposed changes to standard terms and conditions through their Annual RPS Plans.

B. Restriction on Negotiation of Standard Terms & Conditions is Counterproductive, Unnecessary, & Should be Eliminated

The dynamic and innovative nature of RPS technologies and projects, and the resulting individual needs of their developers and financiers, requires a flexible approach. Reasonable changes to standard terms and conditions must be accommodated to ensure project financing and

²⁰ 2007 Annual RPS Plan Scoping Memo at 4, Attachment C at 2.

²¹ D.04-06-014 at 6.

the ultimate success of desirable RPS projects. Rigid, non-negotiable terms cannot keep pace with changes in law, financial market requirements, or RPS developments, and may be neither commercially justified nor logically tailored to the project at issue. In the face of such terms, the time required for renewables contracting has been extended, rather than shortened, and the viability of RPS projects that could further all of the goals of the RPS program has been needlessly threatened.

The Joint Ruling noted the potential desirability of greater flexibility (even with respect to otherwise non-negotiable terms) and expressly identified this issue as a potential subject for future Commission action.²² In light of the experience the IOUs have gained in their negotiations with RPS developers, the time to allow greater flexibility is now. The value of standard terms and conditions, and particularly non-negotiable provisions, must be considered within the overall goals of the RPS program. It has become clear to the Petitioners that standard term and conditions should be optimized based on experience, and that the cost of non-negotiable terms outweighs any perceived benefit.

Two reasons have been identified for the restriction on negotiations of the designated terms conditions. First, the need for a “parens patriae” approach has been alleged, protecting RPS developers from agreeing to terms that they might not like. Experience has shown that sellers neither need nor want this protection; they prefer greater flexibility to tailor contracts to their specific needs. Furthermore, in the acknowledged “sellers’ market” in California,²³ which can be expected to continue at least until RPS-obligated entities have attained the 20% RPS target and achieved a “steady-state,” sellers have appreciable negotiating leverage.

²² Joint Ruling at 6.

²³ Energy Daily, “Public Power: Market Mechanisms Distort Clean Energy Prices,” at 3 (Jan. 29, 2007)(quoting Jan Schori, general manager of the Sacramento Municipal Utility District (“SMUD”).

Second, consistency had historically been raised as an important element of RPS contracts, presumably in anticipation of the development and approval Renewable Energy Credit (“REC”) system. As the Commission is aware, a regional tracking system, the Western Renewable Energy Generation Information System (“WREGIS”), is well underway, and the issue of whether the Commission will adopt RECs for compliance purposes is slated for consideration in R.06-02-012.²⁴ If consistency of contract terms is believed necessary to establish a tradable REC product, it deserves consideration when it is truly material, in the context of the REC proceeding. The potential value of consistency for any other purpose is unlikely to outweigh the substantial threat of harm from inflexibility and resulting delays in project approval, as discussed herein.

The restriction on negotiations of certain terms and conditions, far from proving beneficial or necessary, has proven problematic for several reasons. For example, the Joint Ruling clearly stated that “[a]ll terms and conditions must be consistent with the law.”²⁵ The law applicable to RPS contracts is always subject to change, and has conflicted with the current non-negotiable terms and conditions. When such changes occur, as when the California Supreme Court limited counterparties ability to waive rights to a jury trial,²⁶ or when greenhouse gas²⁷ or other new environmental requirements are adopted, conflicting or newly ambiguous standard terms and conditions must be modified to conform to those changes. The Commission is currently considering changes needed to implement SB 107 through the R.06-05-027 proceeding; fortunately, those changes coincided reasonably well with the Annual RPS Plan. Experience has shown that other changes are necessary as well, such as modifications to the

²⁴ See Amended Scoping Memo and Ruling of Assigned Commissioner, R.06-02-012, at 4-6 (Dec. 29, 2006).

²⁵ Joint Ruling at 10.

²⁶ Grafton Partners v. Superior Court (PRICEWATERHOUSECOOPERS L.L.P.), 36 Cal. 4th 944 (2005).

²⁷ See, e.g., A.B. 32.

“standard” assignment clause, which counterparties have informed Petitioners is currently commercially unacceptable and are not consistent with the approach to assignment and the restrictions on governmental limitations of such assignments in Sections 9406(d) and (f) of the Uniform Commercial Code.

When changes are reasonably necessary to contract with desirable, otherwise viable RPS projects that can contribute to RPS goals, those changes should be approvable through advice letter. The utility would, in its advice letter submittal, still be required to provide the justification for its proposed variations from standard terms and conditions, unless the Commission had previously approved such variations.

C. RPS Contracts Should be Approved Through the Advice Letter Process

The advice letter process is the most appropriate and expeditious way to consider RPS contracts, including those that vary from standard terms and conditions currently designated as non-negotiable. The changing nature and needs of RPS projects and the commercial and legal environment in which contracts are consummated has been even greater than anticipated. To support continued progress towards RPS targets without unmerited delay or undue strain on the resources of the Commission and all other entities concerned, the changes in standard terms and conditions needed to accommodate the dynamic needs of RPS projects should be approvable through the advice letter process. The Commission, in D.05-01-032, has determined that even contracts raising legal interpretation issues or factual issues not requiring evidentiary hearing can be addressed through the advice letter process, if the advice letter is approved by Commission resolution, as opposed to direct approval by the applicable industry division.²⁸ There are no compelling reasons why variations from standard terms and conditions should not be approvable through the advice letter process.

²⁸ D.05-01-032 at 8-10 (Jan. 2005).

To an even greater extent than for RPS-obligated entities, who are acutely aware of the 2010 target, time is often of the essence for RPS developers and their financiers. The prospect that changing terms will divert approval from the advice letter process to the potentially much-longer application process is simply commercially unacceptable for many RPS developers and financiers. Moreover, it creates risks for RPS developers that are inconsistent with the Commission's policy to promote RPS development.

The uncertainties inherent in the application process can substantially reduce the likelihood of RPS success and increase the costs of RPS contracts, for several reasons. The online date of an RPS project may well be delayed by the mere possibility that the application process may take a protracted amount of time, as sellers' reluctance to invest further resources in their projects, including commitment to equipment or other binding expenditures, increases in proportion to potential delay in the anticipated approval date. During a lengthy approval process, potential for changes in cost inputs to RPS projects also increase. These inputs include, but are not limited to, the expiration of tax credits (limiting the ability of the project to take advantage of such credits); changes in commodity prices (e.g., steel, cranes, labor), and changes in availability of increasingly-scarce renewable generation equipment. These factors, and the concomitant increase in risk to sellers, may contribute to increased financing costs. Higher prices to buyers can be expected as a result, as sellers will seek to recover their potential increases in costs as well as a premium to account for their increased risk. If RPS developers and financiers cannot assuage their concerns sufficiently through increased prices, the developers may well offer their often-scarce renewable equipment and financing to other, more accommodating markets competing for renewable projects.

The slippages in online dates, increases in contract pricing, lost opportunities and increase in perception of difficulty of project approval in California could cause substantial harm

to the RPS program and its chances for success. The approval of RPS contracts through the advice letter process and Commission resolution would reduce these risks to a minimum, while providing ample procedural protection, remaining fully consistent with the Commission's policy on the contract approval process,²⁹ and reducing the administrative burden of the RPS program.

V. CONCLUSION

The Commission anticipated that the approach to the standard terms and conditions adopted by the Joint Ruling and D.04-06-014 would need adjustment to fit the needs and experience of the RPS program as it developed. The general approach adopted by D.04-06-014 has served the program well, but increased flexibility, consistent with the theme of S.B. 107, has emerged as a necessity to allow changes in standard terms and conditions to conform to law, project specifics, developer financing needs, and the commercial needs of desirable RPS projects whose viability depends on such changes.

Allowing adjustments to all RPS standard terms and conditions, and approval of contracts containing such adjustments through the advice letter process, would improve the efficiency of the RPS process. The relief requested by this petition would better enable RPS-obligated entities to attain the increased "focus on seeking and signing the best possible contracts for renewable energy" that the Commission desires³⁰. The clarifications and modification requested herein would thus enhance the ability of RPS-obligated entities to attain the 20% target, and promote the ultimate success of the RPS program overall.

²⁹ Id. at 8-10.

³⁰ D.06-10-050 at 13 (quoting D.06-05-039 at 29, in turn citing D.05-07-039 at 12).

Respectfully submitted,

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CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the party to the within cause; and that my business address is 77 Beale Street, B30A, San Francisco, California 94105. I hereby certify that I have this day electronically served the foregoing document(s) upon each member of the official service list of **R.04-04-026** pursuant to Rule 2.3 of the California Public Utilities Commission's Rules of Practice and Procedure

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on the attached service list, and if no e-mail address was available, the party was served by U.S. Mail.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 1, 2007, at San Francisco, California.

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